Goh Hock Hai v Eon Bank Bhd

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22NCVC-38 OF 2011
VARGHESE GEORGE J
12 JANUARY 2012

Civil Procedure — Judgment — Res judicata — Plaintiff filed fresh action to impeach judgment in earlier suit dismissing his claim against defendant — Court in earlier suit accepted defendant's expert evidence that plaintiff's authorisation letters to defendant were genuine — Plaintiff failed to call rebuttal expert evidence to say letters forged — Plaintiff in fresh action produced report rehashing forgery issue — Whether plaintiff barred from re-litigating decided issue — Whether deliberate fraud or deception practised on court in earlier suit or material evidence suppressed — Whether plaintiff's fresh action frivolous and vexatious

The plaintiff sought to set aside by way of the instant impeachment action the High Court's judgment in a previous suit ('the 2001 suit') between the parties dismissing the plaintiff's claim against the defendant bank. In the 2001 suit, the plaintiff had sought to recover RM4.8m from the bank alleging the bank had transferred that sum from his personal account to a third party without his authorisation. The bank had contended that the plaintiff did authorise the transfer and relied upon two authorisation letters he had signed. Although the plaintiff disputed his signatures in the letters as forgeries he failed to call any expert witness at the trial to support that contention or to rebut an expert witness the defendant had called to testify that the signatures were his. Based on that witness' evidence as well as on other grounds, the trial judge dismissed the 2001 suit. The plaintiff appealed against that decision to the Court of Appeal but discontinued the appeal when his attempt to adduce fresh evidence at the appeal stage was refused. The plaintiff sought for a full trial of the instant action to impeach the decision in the 2001 suit by producing a signature verification Report which opined that the plaintiff's signature in a photocopy of one of the authorisation letters was a 'traced forgery'. The defendant applied under O 18 r 19(1)(b) and (d) of the Rules of the High Court 1980 and the court's inherent powers to strike out the plaintiff's suit on the ground of res judicata. The defendant argued that the plaintiff was precluded on the basis of cause of action and issue estoppel from reopening issues that had been finally determined in the 2001 suit.

Held, allowing the application to strike out the suit with costs:

(1) There was no basis to impeach the judgment in the 2001 suit as no prima facie material was produced to show the judgment was obtained as a

result of a deliberate fraud perpetrated on the court or by reason of a deception on the court or by suppression of material evidence by the defendant (see para 24).

(2) The plaintiff did not show any exceptional grounds for the court to depart from the application of the principle of res judicata. The plaintiff was not entitled to re-agitate or re-litigate the very same issues between the parties that had been determined conclusively in the 2001 suit (see para 20).

(3) The excuse that the alleged 'forgery' was only now discovered was unacceptable. The photocopy of the authorisation letter in question (the original of which was tendered in evidence in the previous trial) was available to the plaintiff as early as 2001. The plaintiff had the opportunity and the right to adduce contrary expert evidence to resist the defendant's case but he chose not to do so (see para 18).

(4) The plaintiff's instant action was frivolous and vexatious, unsustainable and doomed to failure. There was no merit in the contention that just because the action was grounded upon s 44 of the Evidence Act 1950, the mere suggestion of fraud or forgery was sufficient to have the plaintiff's complaint fully tried. Allowing the matter to go to full trial would be tantamount to the court condoning the plaintiff's abuse of process of the court (see paras 24–25).

[Bahasa Malaysia summary

Plaintif memohon untuk mengetepikan melalui tindakan mencabar penghakiman Mahkamah Tinggi dalam guaman yang sebelumnya ('guaman 2001') antara pihak-pihak yang menolak tuntutan plaintif terhadap bank defendan. Dalam guaman 2001, plaintif telah memohon untuk mendapatkan kembali RM4.8juta daripada bank dengan mendakwa bahawa bank telah memindahkan jumlah wang tersebut daripada akaun peribadinya kepada pihak ketiga tanpa kebenarannya. Bank telah menghujahkan bahawa plaintif telah membenarkan pemindahan dan bersandarkan kepada dua kuasa surat yang telah ditandatanganinya. Walaupun plaintif mempertikaikan tandatangan dalam surat tersebut sebagai pemalsuan, dia gagal untuk memanggil mana-mana saksi pakar ketika perbicaraan untuk menyokong hujahan tersebut atau mematahkan saksi pakar yang telah dipanggil oleh defendan untuk memberi keterangan bahawa tandatangan tersebut adalah miliknya. Berdasarkan keterangan saksi tersebut serta atas alasan lain, hakim perbicaraan menolak guaman 2001. Plaintif merayu terhadap keputusan tersebut ke Mahkamah Rayuan tetapi menghentikan rayuan tersebut apabila cubaannya untuk mengemukakan keterangan baru di peringkat rayuan telah ditolak. Plaintif memohon untuk perbicaraan penuh tindakan ini untuk mencabar keputusan dalam guaman 2001 tersebut dengan menghasilkan laporan pengesahan tandatangan yang berpendapat bahawa tandatangan

plaintif dalam salinan satu surat kebenaran adalah 'traced forgery'. Defendan memohon di bawah A 18 k 19(1)(b) dan (d) Kaedah-Kaedah Mahkamah Tinggi 1980 dan kuasa sedia ada mahkamah untuk membatalkan saman plaintif atas alasan res judicata. Defendan menghujahkan bahawa plaintif telah terhalang atas sebab tindakan dan isu estopel daripada pembukaan semula isu-isu yang telah diputuskan yang telah diputuskan dalam guaman 2001.

Diputuskan, membenarkan permohonan untuk membatalkan saman dengan kos:

(1) Tiada asas untuk mencabar penghakiman guaman 2001 tersebut kerana tidak ada material prima facie yang telah dihasilkan untuk menunjukkan penghakiman telah diperolehi sebagai hasil daripada penipuan yang sengaja dilakukan di mahkamah atau oleh sebab penipuan di mahkamah atau melalui sorokan keterangan material oleh defendan (lihat perenggan 24).

(2) Plaintif tidak menunjukkan apa-apa alasan yang luar biasa untuk mahkamah menyimpang daripada pemakaian prinsip res judicata. Plaintif tidak berhak untuk mengganggu atau melitigasi semula isu-isu yang sama antara pihak-pihak yang telah diputuskan secara muktamad dalam guaman 2001 (lihat perenggan 20).

(3) Alasan bahawa dakwaan 'pemalsuan' baru ditemui tidak boleh diterima. Salinan surat kebenaran berkenaan (yang mana salinan asal telah dikemukakan sebagai bukti dalam perbicaraan sebelumnya) adalah tersedia bagi plaintif, seawal tahun 2001. Plaintif mempunyai peluang dan hak untuk mengemukakan keterangan pakar yang berlawanan untuk menentang kes defendan tetapi dia memilih untuk tidak berbuat demikian (lihat perenggan 18).

(4) Tindakan plaintif ini adalah remeh dan menyusahkan, tidak kekal dan gagal. Tidak ada merit dalam hujahan bahawa hanya kerana tindakan tersebut berasaskan s 44 Akta Keterangan 1950, cadangan penipuan atau pemalsuan semata-mata adalah mencukupi untuk aduan plaintif dibicarakan sepenuhnya. Membenarkan perkara tersebut untuk dibicarakan penuh akan dianggap sebagai mahkamah membiarkan plaintif menyalahgunakan proses mahkamah (lihat perenggan 24–25).]

Notes

For cases on res judicata, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4358–4360.

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)

A *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393, FC (refd)
Bandar Builders Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)
Boo Are Ngor (P) v Chua Mee Liang (sued as public officer of Kim Long Tze
B *Temple)* [2009] 6 MLJ 145; [2009] 6 CLJ 617, FC (refd)
Chee Pok Choy Ors v Scotch Leasing Sdn Bhd [2001] 4 MLJ 346; [2001] 2 CLJ 321, CA (refd)
Citibank NA v Mrs ND Chandrasegaran Nee Nirmala Devi a/p P Ratnadurai [2007] 8 MLJ 149; [2008] 7 CLJ 640, HC (refd)
C *Everise Hectares Sdn Bhd v Citibank Bhd* [2011] 2 CLJ 25, CA (refd)
Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd [1996] 2 MLJ 57, CA (refd)
Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143, FC (refd)
Letchumanan a/l Gopal (representative for the Estate of Rajammah a/p
D *Muthusamy, deceased) v Pacific Orient Co Sdn Bhd* [2011] 6 MLJ 788; [2011] 5 CLJ 866, CA (refd)
Lubrizol Corp v Imperial Oil Ltd [1990] FCJ No 816, FC (refd)
Pemunya Kapal M v Brihope & Ors T Emmanuel E Okwousa & Ors [1997] 1 MLJ 453, CA (refd)
E *S & M Shopping Arcade Sdn Bhd v CH Williams, Talhar & Wong Sdn Bhd* [2007] 7 MLJ 468; [2007] 10 CLJ 738, HC (refd)
SP Chengalavarya Naidu v Jagannath AIR 1994 SC 853, SC (refd)
Tan Kah Khiam v Liew Chin Chuan [2007] 2 MLJ 445; [2006] 4 CLJ 715, CA (refd)
F *Tenaga Nasional Bhd v Prorak Sdn Bhd & Anor* [2000] 1 MLJ 479, CA (refd)
Vijayalakshimi Devi a/p Nadchatiram v Mahadevi a/p Nadchatiram [2011] 1 LNS 71, HC (refd)
Yap Teck Ngian lwn Han Tong Kwang dan lain-lain [2003] 5 MLJ 178, HC (refd)
G

Legislation referred to

Evidence Act 1950 ss 44, 47
Rules of the High Court 1980 O 18 r 19, O 18 r 19(1)(a), (b), (d)

H *M Patmanathan (Ajmer Singh Sandhu, Joshua Narendran and Shirin Pathmanathan with him) (Ajmer Sandhu & Ong) for the plaintiff.*
Ramesh Sanghvi (Kassim Tadin, Wai & Co) for the defendant.

Varghese George J:

I

INTRODUCTION

[1] The principal relief sought by the plaintiff in the substantive action here was to set aside a judgment entered on 26 August 2010 against the plaintiff in

another suit, namely in Penang High Court Civil Suit No 22–66 of 2001 ('Penghakiman bertarikh 26.08.2010 yang diberikan oleh Mahkamah Tinggi, Pulau Pinang di dalam Guaman Sivil No 22-66-2001 diketepikan').

The parties in this instant case were also the respective plaintiff and defendant in that 2001 suit where the judgment in question had been delivered by the court after a full trial.

At the outset of this proceedings, that is during case management, counsel for the plaintiff indicated that the instant action was essentially to 'impeach' that judgment of 26 August 2010 in the 2001 suit.

[2] Enclosure 13 was an application by the defendant brought pursuant to O 18 r 19(1)(b) and (d) of the Rules of the High Court 1980 and the inherent powers of the court, to strike out the plaintiff's amended writ and amended statement of claim.

The defendant relied on the doctrine of 'res judicata', and contended that the plaintiff was precluded, on account of both cause of action and issue estoppels, from reopening the issues that had been determined in the 2001 suit and that the plaintiff had no longer any 'actionable cause of action' in the dispute between the parties.

BACKGROUND

[3] Civil Suit No 22–66 of 2001 was filed in 2001 by the plaintiff against the defendant to recover, what was there alleged as, wrongful transfers without the plaintiff's consent of two sums of monies (RM3,277,122.92 and RM1,482,236.56) from the plaintiff's personal bank account with the defendant, to a third party (Handee Engineering and Consultancy Sdn Bhd).

The defence raised by the defendant in that action was that the defendant had acted on the verbal and written instructions of the plaintiff in effecting the impugned two transfers.

[4] The defendant more particularly relied on two letters of authorisation, namely dated 31 December 1996 and 3 January 1996 (3 January 1997) executed by the plaintiff.

The plaintiff countered there that the signatures on those letters alleged to be his, were forgeries. The onus therefore was definitely on the plaintiff to prove that the alleged signatures were forgeries.

[5] In the event, the central issue for determination in the 2001 suit was whether the plaintiff was the author of those two letters of authorisation.

At the trial, the defendant called a forensic document examiner (*Siow Kwen*

Sia) as the defendant's expert witness whose evidence was that the plaintiff was the author of the two letter of authorisation (31 December 1996 and 3 January 1996 (1997)).

The same documents had been made available to the plaintiff's solicitors for examination by a forensic expert on behalf of the plaintiff (*whom the plaintiff had, at some stage of the proceedings, named as one Mr William Peng of Singapore*). However at the trial, as the notes of proceedings of the court attested to, the plaintiff opted not to call any forensic expert as witness to support the plaintiff's case or to rebut the defendant's expert witness's testimony (see encl 14: exh 'YSY5' at p 47).

[6] The learned trial judge in the 2001 suit accepted the evidence of the defendant's witness *Siow Kwen Sia* that the signatures on the two letters of authorisation were that of the plaintiff and on that and the other grounds spelt out in His Lordship's judgment (discussed later in this grounds of decision), went on to dismiss the plaintiff's 2001 suit.

[7] The plaintiff's present impeachment action was premised upon what is referred to as a 'signature verification report' of one *Lim Yok Chaw*, reportedly secured recently by the plaintiff which it was submitted expressed an opinion that the photocopy of one of the two letters of authorisation tendered to court, namely that of 3 January 1996 (1997), was a 'traced forgery'.

[8] The attention of this court was also drawn to the fact that the plaintiff had lodged an appeal against the judgment of 26 August 2010 in the 2001 suit. However this appeal, as it transpired had since been discontinued after the plaintiff's attempt to 'adduce fresh evidence' at the appeal stage was refused by the Court of Appeal.

IMPEACHMENT OF JUDGMENT

[9] The Court of Appeal speaking through Gopal Sri Ram JCA (as His Lordship then was) in *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346; [2001] 2 MLJ 321, captured in the following extract the essential elements of the law *on impeachment of a judgment for fraud practiced on the court*:

> I think I may begin this part of the case by referring to s 44 of the Evidence Act 1950. It read as follows:
>
> > Any party to a suit or other proceedings may show that any judgment, order or decree which is relevant under s.40, 41 or 42 and which has been proved by the adverse party, was delivered by a court not competent to deliver it or was obtained by fraud or collusion.

There is a most helpful commentary upon this section in *Evidence, Practice and Procedure* (2nd Ed), by Augustine Paul J. I am indebted to the author of that work for collecting what I think are all the relevant cases touching upon what the section required before a judgment is impeached for fraud. The position was summarised by Edgar Joseph Jr J (as he then was) in *Seng Huat Hang Sdn Bhd & Ors v Chee Seng & Com Sdn Bhd* [1987] 1 MLJ 413 at p 418 as follows:

> Now 'acts of the highest judicial authority,' though 'not to be impeached from within' yet are impeachable from without', for 'although it is not permitted to show that the court was mistaken, it may be shown that they were misled. Fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of courts of justice' — per De Gray CJ in *Duches of Kingston*'s Case 2 Smith LC (13th Ed) 644 at p651. 'Fraud' said Lord Buckmaster 'is an insidious disease, and if clearly proved to *have been used so that it might deceive the court*, spreads to infect the whole body of the judgment.' — in *Jonesco v Beard* [1930] AC 298 (HL) at p 301.
>
> On the other hand, in the Australia case of *Price v Stone* [1964] VR 106 Gillard J pointed out the *necessity of proving a deliberate fraud upon the court as a foundation of this relief,* and contrasted this with misleading or erroneous evidence falling short of this requirement.
>
> This last point comes in for emphasis in *Patch v Ward* (1867) 3 Ch App 203 and in the *New Zealand case of Giffen v Leggatt* [1902] 2 NZLR 427.

His Lordship Gopal Sri Ram then went on to state:

> The principle then to be culled from the authorities is that a judgment may be impeached for *deliberate fraud practiced upon the court*, and it is insufficient to show that a litigant merely convinced the court through misleading or erroneous evidence. Whether the test has been met in any given case must, I think, depend on the facts and circumstances of the particular case.

[10] Those principles were applied by the High Court in the case of *Vijayalakshimi Devi a/p Nadchatiram v Mahadevi a/p Nadchatiram* [2011] 1 LNS 71 where Balia Yusof J (as he then was) on the facts held that there was proof of 'collusion' by the defendant with another in withholding material evidence from the court, to gain an advantage over the other party.

The authorities cited by counsel for the plaintiff, namely *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143(Federal Court), *Pemunya Kapal M v Brihope & Ors T Emmanuel E Okwousa & Ors* [1997] 1 MLJ 453 (Court of Appeal), *Yap Teck Ngian lwn Han Tong Kwang dan lain-lain* [2003] 5 MLJ 178(High Court) and *Citibank NA v Mrs ND Chandrasegaran Nee Nirmala Devi a/p P Ratnadurai* [2007] 8 MLJ 149; [2008] 7 CLJ 640 (High Court), all no doubt affirmed the right that a party had to set aside a judgment obtained by fraud or deception. By the decision *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393, such recourse was definitely available if the judgment or order obtained was in breach of a statute or made without or in excess of jurisdiction.

[11] However, to carry that 'right' to its conclusion, *there had to some prima facie evidence to form the foundation of the allegation of 'deliberate fraud'* or 'deception' practiced on the court or of the withholding of some material from which an inference of 'concealment or 'suppression' could be drawn form.

In the Indian case of *SP Chengalavarya Naidu (deceased) v Jagannath* AIR 1994 SC 853, (quoted in *Mrs ND Chandrasegaran*'s case), it was noted:'A fraud is an act of deliberate deception with the design of secur*SP Chengalavarya Naidu (deceased) v Jagannath* AIR; 1994 SC 853ing something by taking unfair advantage of another. It is deception in order to gain by another's loss. It is cheating intended to get an advantage.'

[12] After the first round of written submissions were filed by the respective counsel, I directed further submission be filed on four question/issues formulated by me. They were:

(a) was there deliberate fraud committed on the court in the 22–6 of 2001 suit by the defendant (bank) in obtaining the judgment and if so, to highlight the relevant material by reference to the notes of proceedings/evidence adduced;

(b) did the defendant (bank) suppress material evidence in obtaining the judgment in the 22–6 of 2001 suit and if so, to indentify the relevant material or how such suppression arose;

(c) did the plaintiff have access to or knowledge of the photocopies of the letter now alleged to be forged, during the course of the trial in the 22–66 of 2001 suit; and

(d) is this court limited from considering an application under O 18 r 19 of the RHC 1980, in the light of the plaintiff's claim that the plaintiff's action is brought to impeach the judgment in the 22–66 of 2001 suit.

[13] The plaintiff's counsel in his supplementary submission merely recited or rather repeated the principles underlying the available relief of impeachment. He failed to identify any material or credible basis which would support a possible conclusion of 'deliberate fraud'. He avoided answering the specific questions posed, especially questions (a) and (b) above.

Counsel however conceded that the document which was the subject of the 'signature verification report which the plaintiff was advancing in this action, namely the photocopy of the letter of authorisation of 3 January 1996 (1997), had been indeed available to the plaintiff from the early stages of the proceedings in the 2001 suit.

The thrust of the plaintiff's argument was however that when issues of 'fraud' involving a material piece of evidence was raised in the context of an 'impeachment' of judgment action, that issue should not be decided

summarily or purely on affidavit evidence. It was counsel submission that in such circumstances, as a matter of 'right' — the action should go for full trial.

[14] I could not agree with counsel for the plaintiff that just because he was now crying 'fraud' or 'forgery', the plaintiff was entitled to a full trial to impeach the judgment duly entered in the 2001 suit in favour of the defendant.

It was my view that when challenged by the defendant in this application to strike out the action, the plaintiff had the further obligation to show, that there was some evidentiary basis, to merit the action to be remitted for a full trial to establish that alleged 'deliberate fraud' practiced by the defendant on the court.

There was none here brought to the attention of the court and neither was there any material which remotely would even support any such inference to be drawn. To the contrary the discussion on the issue of 'res judicata', below in this grounds of decision, all pointed to the contrary conclusion.

RES JUDICATA

[15] In *Chee Pok Choy Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346; [2001] 2 CLJ 321, the doctrine of res judicata was laid out in the following words:

> Now res judicata is not merely a technical rule of pleading. It is a *doctrine of substantial justice*. It is a process whereby justice is achieved procedurally by precluding a party from re-agitating in subsequent proceedings a complaint or *an issue that had, or could fairly have, been disposed in earlier proceedings between the same parties or their privies.* It is merely equity in action in the procedural arena. It is sometimes referred to as the rule in *Henderson v Henderson* (1843) 67 Er 313. In that case, Wigram V-C said:
>
> > In trying this question I believe I state the rule of the court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties *to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest, but which was not brought forward,* only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applied, except in special cases, not only to points upon which the court was actually required by the parties to form on opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time.
>
> The doctrine may thus be seen to encompass several categories. In its narrowest sense, res judicata, I think, refers to estoppels by record. It refers to the actual decision the earlier action or proceedings. In its wider sense, it encompasses issued,

A and cause of action that could justly and fairly have been equally adjudicated in the earlier suit or proceedings. This wider operation of the doctrine is sometimes referred to 'constructive res judicata'. It houses the twin concepts of issue estoppels and cause of action estoppels. Like the tree of which they form the branches, they are designed to ensure that there is finality in litigation.

B The wide reach of the doctrine of res judicata have found favour in the numerous decisions of the courts including in *Tenaga Nasional Bhd v Prorak Sdn Bhd* [2000] 1 MLJ 479; *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; *Everise Hectares Sdn Bhd v Citibank Bhd* [2011] 2 CLJ 25; *S & M Shopping Arcade Sdn Bhd v CH Williams, Talhar & Wong Sdn* C *Bhd* [2007] 7 MLJ 468; [2007] 10 CLJ 738.

[16] Further, our Court of Appeal in the case of *Tan Kah Khiam v Liew Chin Chuan* [2007] 2 MLJ 445; [2006] 4 CLJ 715 cited with approval the following D passage from the Canadian Federal Court of Appeal case of *Lubrizol Corp v Imperial Oil Ltd* [1990] FCJ No 816:

> *Save in exceptional circumstances, a litigant who has had a full opportunity of adducing evidence at trial will not be permitted to reopen his case so as to allow new evidence to be introduced after the judgment at trial Becker Mild Co Ltd et al v Consumers Gas Co* E [1974] 2 OR (2d) 554 (CA)). It has been well observed that as under our adversary system of justice, 'what witnesses are called and what questions they are asked in a matter left to counsel' and it its counsel who 'makes decisions both strategic and tactical, as to what approach will be taken … counsel cannot later complain about the absence of evidence at Thai' (*International Corona Resource Lt v LAC Minerals* F *Ltd* (1988) 66 OR (2d) 610.

[17] Undergirding the doctrine of 'res judicata' are:

(a) the general public interest policy that the same issue (or cause of action or G issue) should not be litigated more than once (even if the parties are different); and

(b) the requirement of certainty and finality which are the two pillars on which the judicial process rests.
(*Letchumanan a/l Gopal (representative for the Estate of Rajammah a/p* H *Muthusamy, deceased) v Pacific Orient Co Sdn Bhd* [2011] 6 MLJ 788; [2011] 5 CLJ 866; *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57).

[18] The issue relating to the 'traced forgery' that was being attempted to be I canvassed by the plaintiff as the basis to set aside the judgment in the 2001 suit was in respect of *a photocopy* of a letter dated 3 January 1996 (1997) which was attached as an exh (IMK3) to an affidavit affirmed by one Idris Kassim on 26 June 2001. The plaintiff conceded that the 'photocopy' in question was available as early as 2001.

In fact, the notes of proceedings of the 2001 suit bear out that the affidavit of Idris Kassim was even *tendered by the plaintiff* during the course of the trial in the 2001 suit and admitted and marked 'P7'.

Also during the trial the original of the letter of 3 January 1996 (1997) was tendered and accepted trial as D2. The *ikatan dokumen bersama* (B) at p 174 also contained the photocopy of the letter of 3 January 1996 (1997) as was also the photocopy of the other letter of authorisation dated 31 December 1996.

There was no denying that the plaintiff was well aware of the existence of the photocopy of the letter of 3 January 1996 (1997), as was the stark fact that the 'photocopy' was indeed always available for the plaintiff to develop any position that they might choose to resist the defendant's case at the trial of the 2001 suit.

However, it would be recalled that it was the plaintiff who opted not to call any expert to demolish that crucial evidence or to rebut the defendant's document.

[19] What the plaintiff was attempting to do in this current action was to reopen the same subject or issue which had been duly litigated and concluded before the court in the 2001 suit.

[20] In my finding, no 'exceptional' grounds were shown by the plaintiff for this court to depart from the application of the jealously applied doctrine of res judicata by the courts to ensure substantial justice between the parties. The plaintiff was not entitled in this case to reagitate or relitigate the very same issues between the parties that had been determined conclusively in the 2001 suit.

The excuse that such alleged 'forgery' was only now discovered was not acceptable at all definitely in the factual context of this case. The plaintiff had the opportunity, and for that matter, the plaintiff was never denied the right to adduce any contrary expert evidence. It must be reiterated that it was the plaintiff who chose not to.

[21] Further it is also significant to note that the decision of the learned judge in the 2001 suit did not just turn on the acceptance by the court that the letter of authorisation of 3 January 1996 (1997) was authored by the plaintiff. It could be gleaned from the grounds of decision of the learned judge that the conclusion he reached was also supported by other factors. Amongst them were the other considerations indicated in the following extracts from the grounds of judgment in the 2001 suit:

(a) the testimony of SP2, the plaintiff's secretary that the signatures in the letters of 13 December 1996 and 3 January 1996 (1997) 'looks like the signature' of the plaintiff. This was accepted by the learned judge (as

admissible under s 47 of the Evidence Act) 'in dispelling any motion that the signatures in the said letters were not the plaintiff's';

(b) '… the Plaintiff had on several occasions prior to the 2 transfers given instructions to the Defendant Bank in a manner similar to the instructions leading to the said transfer';

(c) 'Exhibit D1 and D2 coincides and contemporaneous with Handee's letters dated 31.12.1996 (Exh D16) and 3/1/1997 (Exh D17) which were signed by the Plaintiff instructing the Bank to debit Handee's current account for settlement of several Trust Receipts and Bankers Acceptance (the Trust Receipts).

It is to be noted t at no queries or disputes whatsoever had been raised by Handee, of which the Plaintiff is a director and shareholder, in respect of the credited sum of RM3,277,122.92 and RM1,484,236.56 transferred from the Plaintiff's personal account and the sums as debited for the settlement of several Trust Receipts.'

It is significant to note as well that Handee's letter of instruction to the Bank dated 31/12/1996 (Exh.D 16) to debit their current account for settlement of several Trust Receipts was in fact signed by the Plaintiff (and another director), a fact which the Plaintiff had conceded in cross examination (although claiming that he could not remember when he had signed the said letter) and that he had signed the letter because he was asked to do so by Handee.

(d) '… the practice or convention which had been mutually accepted by the Plaintiff and the Bank would estop the Plaintiff from denying having issued the verbal instructions and the said Exhibit D1 and D2';

(e) '… the Plaintiff conceded that he did not notify the Bank of the alleged unauthorized debits within 21 days of the date of the Statement of account… as such the Plaintiff is stopped from denying having authorised the said transfers. The Plaintiff is deemed to have waived his rights to do so.'; and

(f) 'The alleged loss is not a few thousand but more than four million ringgit that could not easily escape the Plaintiff's attention.'

[22] It was on the totality of the evidence before the court that the plaintiff's 2001 suit was dismissed by the learned judge after a full trial. To disturb the said result would in any event subject the defendant to greater injustice.

ORDER 18 R 19 OF THE RHC 1980

[23] It is trite that a defendant can invoke the court's jurisdiction to strike out an action either under O 18 r 19(1)(a)–(d), or under the court's inherent powers to do justice, where the plaintiff's case is plainly and obviously unsustainable on the facts or in law. Such instances of unsustainable action

include where 'limitation' in respect of any alleged claim had set in or on the grounds that such action is precluded based on the doctrine of 'res judicata'. A

In *Bandar Builders Sdn Bhd & Ors v United Malayan Banking Corporation Berhad* [1993] 3 MLJ 36, the Supreme Court had occasion to caution as follows: B

> The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the Rules of the High Court 1980 are well settled. *It is only in plain and obvious cases that recourse should be had to the summary process under this rule and the summary procedure can only be adopted when it can clearly be seen that a claim or answer is on the face of it 'obviously unsustainable'.* It cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence. C
>
> … So long as the pleadings disclosed some cause of action or raised some question fit to be decided by the judge, the mere fact that the case was weak and not likely to succeed at the trial was no grounds for the pleadings to be struck out. It cannot be said that they were frivolous, vexatious or may prejudice, embarrass or delay the fair trial of the action or that these pleadings were otherwise an abuse of the process of the court. D

The Federal Court in *Boo Are Ngor (P) v Chua Mee Liang (sued as public officer of Kim Long Tze Temple)* [2009] 6 MLJ 145; [2009] 6 CLJ 617 had this to say about 'the abuse of the process of court': E

> We would also like to state here that it is the court which is empowered to deal with the abuse of its process in the interest of justice and on grounds of public policy.
>
> On this point we would like to refer to the case of *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin & Ors* [1998] 1 SLR 374 wherein His Lordship Yong Pun How CJ in delivering the judgment of the Court of Appeal of Singapore had this to say at p 384: F
>
> > The term, 'abuse of the process of the court, in O 18 r 19(1)(d), has been given a wide interpretation by the courts. It includes considerations of the public policy and the interest of justice. This term signifies that the process of the court must be used bona fide and properly and must not be abused. The court will prevent the improper use of its machinery. It will prevent the judicial process from being used as a means of vexation and oppression in the process of litigation if an action was not brought bona fide for the purpose of obtaining relief but for some other ulterior or collateral purpose, it might be struck out as an abuse of the process of the court. G H

[24] The question whether to strike out the action or not will have to be decided in the particular factual context of each case. After having given due regard to the aforestated principles of law that had to be applied in an application to strike out an action as at hand here before me, the plaintiff's instant action was in my assessment most definitely a plain and obvious case that was doomed to failure and unsustainable. I

A As elaborated above the plaintiff was on the grounds of res judicata precluded from reopening the issue determined in the 2001 suit to the effect that the plaintiff was indeed the author of the letter of authorisation of 3 January 1996 (1997).

B There was no basis for an *impeachment* of the judgment of 26 August 2010 in the 2001 suit either, as there was no prima facie material produced to show that the sought to be impugned judgment was obtained as a result of a deliberate fraud perpetrated on the court in the 2001 suit or by reason of a deception on the court or by suppression of any material evidence by the defendant.

C

[25] The plaintiff's instant action was, to say the least, a frivolous and vexatious one. If this court was to allow the matter to go to full trial, ignoring the above material considerations adverted to (res judicata, no evidence of deliberate fraud), it would be tantamount to the court condoning the
D plaintiff's abuse of the process of court in furtherance of the plaintiff's mala fide intentions to escape the implications on him of the judgment in the 2001 suit which had been properly obtained by the defendant.

[26] For completeness, the following must also be noted. Firstly, contrary to
E submissions of the plaintiff's counsel, the defendant did not anywhere in this application to strike out the plaintiffs instant suit concede or agree to the contents of the 'signature verification report' bandied by the plaintiff in this attempt to impeach the judgment against him in the 2001 suit. In the reply
F affidavit filed for the defendant (encl 15 at paras 19–21) the defendant had unequivocally disputed the said report in it's entirely. It is also my holding that the defendant, in the context and circumstances of this particular case (where the issues had been taken up in trial) was not required to file at this stage any 'rebuttal report' as also canvassed for the plaintiff.

G Secondly, there was no merit either in the plaintiff's contention that since this instant action was grounded upon s 44 of the Evidence Act 1950, the mere suggestion of 'fraud' (or 'forgery') was sufficient to have the plaintiff's complaint fully tried. This line of submission could not be further from the truth as it should be highlighted that all the strict requirements to be met to
H succeed on an 'impeachment of judgment' action as postulated by the Court of Appeal in *Chee Pok Choy*'s case was, as the extract from that judgment cited earlier bear out, made in the specific context of the scope and tenor of that s 44

I

of the Evidence Act, itself.

CONCLUSION

[27] For the reasons above, I allowed the defendant's encl 13 application and struck out the plaintiff's instant action with costs to the defendant.

Application to strike out suit allowed with costs.

Reported by Ashok Kumar